FILE COPY

FILED
DEC 12 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Appellant,*

v.

DIXIE GREYHOUND LINES, INC. ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF APPELLANT

FRANK PACE, JR.,
Attorney for State Revenue Department,
State Capitol,
Little Rock, Arkansas.

AMOS M. MATHEWS,
204 South Canal Street,
Chicago, Illinois.
Counsel for Appellant.

DEMOCRAT P. & L. CO., LITTLE ROCK

SUBJECT INDEX

Page

I

Reply to part I, pages 15-24 of appellee's brief 2

II

Reply to part II, pages 24-29 of appellee's brief 6

III.

Reply to appellee's third point, brief pages 29-34 6

A. It was not raised in District Court 6

B. It is without merit 9

(1) When Act 67 and Act 11 are construed together 9

(2) When Act 67 is construed alone 14

IV

Reply to Part IV, pages 34-46 of appellee's brief 15

CASES CITED

Aero-Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 ..... 3, 8

Baltimore National Bank v. State Tax Commission, 297 U. S. 209 12

Chamberlain v. State, 50 Ark. 132, 6 S. W. 524 13

Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 17

Denver Union Stock Yard Co. v. United States, 304 U. S. 470. 8

Dunn v. Ouachita Valley Bank, 71 Ark. 135, 71 S. W. 265 14

Ex Parte Morrison, 69 Ark. 517, 64 S. W. 270 14

Graham v. Goodcell, 282 U. S. 409 9

Gregg Dyeing Co. v. Query, 286 U. S. 472 ..... 14, 15

Helson v. Kentucky, 279 U. S. 245 3

Henneford v. Silas Mason Co., 300 U. S. 577 5

Interstate Busses Corporation v. Blodgett, 276 U. S. 245 3

Interstate Transit, Incorporated, v. Lindsey, 283 U. S. 183 ..... 6, 15

J. Bacon & Sons v. Martin, 305 U. S. 380 17

SUBJECT INDEX—Continued

Page

Kennedy v. United States, 265 U. S. 344 14

Lawyer v. Carpenter, 80 Ark. 411, 97 S. W. 662 13

Mills v. Sanderson, 68 Ark. 130, 56 S. W. 779 14

Morehead v. New York, 298 U. S. 587 17

Morf v. Bingaman, 298 U. S. 407 ..... 9, 15

New Mexico ex rel. McLean v. D. & R. G. R. R. Co., 203 U. S. 38 3

Pacific States Box & Basket Co. v. White, 296 U. S. 176 8

Pittsburg C. & St. L. Ry. Co. v. Heck, 102 U. S. 120 8

South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177 5

Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. 2d 182 ..... 11, 12

Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753 16

State v. Kirk, 53 Ark. 339, 13 S. W. 925 14

Thompson v. State, 60 Ark. 59, 28 S. W. 794 14

Washington v. Miller, 235 U. S. 422 14

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 3

White v. United States, 305 U. S. 281 9

Wood v. United States, 16 Peters 342 9

STATUTES CITED

Act 67 of the Acts of the 49th General Assembly of Arkansas of 1933, Regular Session, page 194 ..... 2, 4, 5, 7, 9, 10, 11, 12, 14, 15

Act 11 of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, page 28 ..... 7, 8, 9, 10, 12, 15, 16

Act 63 of the Acts of the 48th General Assembly of 1931, Regular Session, p. 171 ..... 10, 11

Act 606 of the Acts of the 43rd General Assembly of Arkansas of 1921, Regular Session, p. 685 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 138

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas ..... *Appellant,*

v.

Dixie Greyhound Lines, Inc. ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF APPELLANT

REASONS FOR FILING REPLY BRIEF

In this reply brief we have no intention to reargue the points covered in our first brief. Appellee's brief, in part III, pp. 29-34, covers a point not raised in the District Court, not mentioned nor made a basis of decision in the opinion of either Court below, and not touched in our first brief. Therefore, we argue that point fully in part III of this reply brief. In the other parts of this reply brief we discuss very briefly the authorities chiefly relied upon by appellee and a few points in appellee's argument.

SUMMARY

I.

Reply to part I, pages 15-24 of appellee's brief.

II.

Reply to part II, pages 24-29 of appellee's brief.

III.

Reply to appellee's third point, brief pages 29-34.

A. It was not raised in District Court.

B. It is without merit,

(1) When Act 67 and Act 11 are construed together,

(2) When Act 67 is construed alone.

IV.

Reply to part IV, pages 34-46 of appellee's brief.

I.

REPLY TO PART I, PAGES 15-24 OF APPELLEE'S BRIEF.

Appellee's argument on its first point, pp. 15-24, only serves to illuminate further the evident propositions (1) that Act 67 of 1933 does not constitute a demand that a motor vehicle operator pay an arbitrarily fixed tax to the state, not related to the use of the highways; (2) but that it does offer to the operator a flexible plan whereby he himself can determine that the tax he pays to Arkansas shall never exceed the amount of the tax on gasoline con-

sumed in Arkansas. Compare *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 289. At the foot of page 15 and top of page 16 appellee lists what it terms three burdensome alternatives imposed upon it by the enforcement of Act 67 of 1933. However, the three alternatives outlined are not a complete nor accurate statement of the choices open to it, as partially appears on page 16 of appellee's brief. Instead of these it can (1) enter the state with 20 gallons or less and if that amount is insufficient for operation in Arkansas add in Arkansas a sufficient amount, thereby paying to Arkansas no more (probably less) than the tax on gasoline actually used there, and avoiding payment to other states of the tax on gasoline taken on in Arkansas; or (2) enter Arkansas under the circumstances detailed in pages 26-28 of our first brief and pay to the state approximately half of the amount of tax which would be required for the gasoline actually consumed in Arkansas. So the laws in question actually do permit an operator to adjust his tax payments to the use of the highways in substantially the same degree as if he were paying a mileage tax. Compare *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245. No unconstitutional burden is imposed on one engaged in interstate commerce by a law which affords him a practical means of avoiding multiple tax burdens, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 259. A state may impose special regulations upon interstate commerce to meet "the exigencies of a particular situation," *New Mexico ex rel. McLean* v. *D. & R. G. R. R. Co.*, 203 U. S. 38, 54.

Appellee discusses at length two cases which do not afford its position the least support, *Helson* v. *Kentucky*, 279 U. S. 245, and *Western Live Stock* v. *Bureau of Reve-*

nue, supra, (303 U. S. 250). There are two features which distinguish the instant case from the *Helson* case: (1) The tax here in question is imposed for the privilege of using the highways, (2) upon one using the highways extensively as a place of business; and these make our tax valid. Neither of these factors was present in the *Helson* case. On pages 39-40 of our first brief we discussed *Western Live Stock* v. *Bureau of Revenue, supra,* pointing out that our tax is valid under the principle there considered because the taxpayer can by the exercise of just ordinary judgment prevent the taxation of the same interest by more than one state.

At the bottom of page 23 appellee cites, as proof of the alleged possibilities of multiple taxation inherent in Act 67, the example of a bus traveling from New York City to Richmond, Virginia, over U. S. Highway No. 1, assuming in the states traversed laws similar to Act 67. But that only proves, again by a practical example, the validity of Act 67. The bus could start from New York City with 20 gallons of gasoline (enough for 100 miles) and run to Philadelphia, a distance of 88 miles, traversing New Jersey on the way without payment of tax. (U. S. No. 1 misses Delaware.) At Philadelphia the fuel tank would be filled until it held 30 gallons. Ten of these would be consumed traveling the 55 miles to the Maryland boundary, and the bus would enter Maryland with 20 gallons. From the Maryland boundary it is 93 miles to Alexandria, Virginia, where more gasoline would be taken on. The bus would have to be refueled in Virginia anyway, even if it left New York with enough gasoline to reach Richmond without a refill. So on that journey the bus operator could comply with laws similar to Act 67 of 1933 in five states and

the District of Columbia and pay a tax in other than the termini states only once—on the thirty gallons purchased in Philadelphia. Interestingly enough, but not necessary for the validity of the law, the tax paid on that thirty gallons (enough for 150 miles) would come about as close as can be demanded in a practical scheme of taxation, to being equal to the tax upon the gasoline consumed on the 143 miles traversed from New York City to the Maryland boundary. We anticipate appellee's objection that the haphazard nature of Act 67 is demonstrated by the fact that New Jersey, Maryland, and the District of Columbia, will collect no gasoline tax, but we call to mind that there is nothing haphazard about that. The 20 gallons exemption is extended to avoid any possible unfairness, and "a taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power," *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587.

The foregoing illustrates, forcibly we submit, that Act 67 affords a fair and practical method whereby Arkansas can collect some gasoline tax from interstate operators who otherwise would pay no tax, and that in its practical operation the Act will not occasion any unconstitutional burden or multiple taxation. The "burden" of complying with Act 67 is not an unconstitutional burden; it is less of a "burden" than other "burdens" which have been held valid; see *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, particularly pages 188-189 including note 5.

Over and beyond the arguments above advanced there is a further reason why the argument of appellee involving

multiplicity of taxes is not pertinent in the instant case. It is to be noted that the tax under consideration is to be levied not upon the sale or use of gasoline but is to be levied as a tax for the privilege of using the highways of the State of Arkansas. Consequently the possibility of a tax by several states upon the same commodity is not present since the tax levied is not upon the gasoline itself, but rather sets up the gasoline in the tank of a vehicle coming into the state as a basis for the tax to be levied for the privilege of using the highways of Arkansas. And as heretofore pointed out the motor vehicle operator has it within his power to fix the amount of such tax by limiting the amount of gasoline in the fuel tank of a vehicle at the time of entering the state.

II.

REPLY TO PART II, PAGES 24-29 OF APPELLEE'S BRIEF

Appellee's argument in pages 24-27 is based on its erroneous understanding of *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183. This has been covered in our first brief, pp. 33-38. Appellee's further argument, pp. 27-29, has been met in part I of this reply brief and in our first brief, pp. 18-28.

III.

APPELLEE'S THIRD POINT, BRIEF PAGES 29-34, WAS NOT RAISED IN DISTRICT COURT, AND IS WHOLLY WITHOUT MERIT.

Appellee's third point, pages 29-34 of its brief, covers a subject matter not touched in appellant's brief. This third point can be disposed of in two ways: (A) It was

not raised by appellee in the District Court, hence is not before this Court. (B) It is without merit.

Appellee's contention is that certain provisions of Act 11 of 1934 so control Act 67 of 1933 that even if the latter act is constitutional the authority of the state under it is only to collect the gasoline tax on the gasoline in the fuel tanks, in excess of 20 gallons, which is actually *used* in Arkansas. Appellee claims that since Act 11 requires a privilege or excise tax upon gasoline "sold or used in this state," then in no event can the tax be collected under Act 67 of 1933, except upon gasoline used in the state.

A. This point was not raised in the District Court. Appellee's bill of complaint as amended (R. 1-15) contains no reference to it; it cannot be found there even by the exercise of the most liberal construction and the widest imagination. Every claim of invalidity alleged is based wholly on conflict with the Constitution of the United States. The first eight lines of paragraph VIII of the bill (R. 11) cannot be construed to raise this point because these lines are specifically limited to invalidity under the Commerce Clause by the remainder of the sentence, these first eight lines being connected to the rest of the sentence by the limiting phrase in the ninth line "for the reason."

Nowhere in the bill of complaint as amended are there words which even remotely approach an allegation that because Act 11 of 1934 requires a privilege or excise tax upon gasoline "sold or used" in Arkansas, the power of the state under Act 67 of 1933 is limited to the collection of the tax upon gasoline in the fuel tanks, in excess of 20 gallons, which is actually used in Arkansas.

As this claim was not before the District Court it was not mentioned in that Court's opinion or findings (R. 24-

32). For the same reason the point does not appear in the opinion of the Circuit Court of Appeals (R. 67-74). That court based its decision solely on repugnancy to the Commerce Clause.

Because appellee did not, in its attack upon the statutes, include this point in its bill of complaint, it is plain that appellee cannot interject the point into the case in this Court. *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 294; *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 484-485; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186. In the *Aero-Mayflower* case this Court said (p. 294):

> "We do not attempt to pass upon the *meaning* of the provisions considered in the foregoing paragraph, or upon their validity under the Fourteenth Amendment * * *. No question as to their *meaning* or validity was raised by the appellant in its petition or complaint." (Emphasis supplied.)

The first place in the record where appellee even attempted to make this claim was in assignment of error 7 (R. 57) on its appeal to the Circuit Court of Appeals. If that assignment had been sufficient to raise the point, it was then too late. *Pittsburg C. & St. L. Ry. Co.* v. *Heck*, 102 U. S. 120; *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission, supra.* But it is submitted that such assignment in itself is insufficient. The only statute mentioned in it is Act 11 of 1934. There is nothing in that act about paying the tax upon all gasoline in excess of 20 gallons in the fuel tanks of a motor vehicle. The assignment does not make the point that Act 67 of 1933 is limited by Act 11 of 1934, as claimed by appellee. Furthermore this assignment is not directed to any action of the

District Court; that Court nowhere made the holding attacked. The Court held that Act 67 of 1933 and Act 11 of 1934 together require payment of the tax in question.

For these reasons this question of statutory construction is not before this Court.

B. We now consider this contention on its merits. It is plain that it has no merit. It is ruled out by relevant legislative history and judicial authority including decisions of this Court and of the Supreme Court of Arkansas. While there is no "doubt" present here, it may be well to observe that appellee's statement with respect to tax laws, "in case of doubt they are construed most strongly against the government" (p. 32), has no force or validity in this case, *White* v. *United States*, 305 U. S. 281, 292. If there were any merit in appellee's point it could be only on the theory of implied repeal; and the familiar presumption against implied repeal has "most appropriate application" with respect to tax laws, *Wood* v. *United States*, 16 Peters 342; *Graham* v. *Goodcell*, 282 U. S. 409; *Morf* v. *Bingaman*, 298 U. S. 407.

On its merits this point should be considered in two divisions: (1) the construction together of Act 67 of 1933 and Act 11 of 1934; and (2) the construction of Act 67 of 1933 independently of other laws. Most assuredly there is no validity in appellee's contention (p. 30) that Act 11 is to be considered alone and Act 67 is not to be considered at all.

(1) Act 67 of 1933 is prior in time to Act 11 of 1934. In considering the construction together of the two Acts it becomes important to learn what laws, corresponding to the relevant parts of Act 11 of 1934, were in effect when

Act 67 of 1933 was enacted. That is, to ascertain the legislative intent in the enactment of Act 67 of 1933 the laws then in effect and affected by it must be considered.

The parts of Act 11 of 1934 relied upon by appellee in making this point are set out in pages 30-31 of its brief. (Appendix A, page 43, of our first brief also contains parts of Act 11 of 1934.) It will be observed that Section 22 of Act 11 of 1934 is, by its express terms, a re-enactment in amended form of paragraph (c) of Section 1 of Act No. 63 of 1931; and that Section 25 of Act 11 of 1934 is a re-enactment in amended form of Section 2 of said Act No. 63 of 1931. These 1931 statutes were in effect when Act 67 of 1933 (page 4 of our first brief) was enacted; and we examine them in aid of the construction of Act 67.

The parts of said Act 63, p. 171, Acts of the General Assembly of Arkansas of 1931, which were superseded, by amendment and reenactment, by the said parts of Act 11 of 1934, are the following:

(Act 63 of 1931)

Section 1, par. (c):

"(c) There is hereby levied a privilege or excise tax of six cents (6c) on each gallon of motor vehicle fuel sold in the state, or purchased for sale in the state for the purpose of propelling any motor vehicle on the public roads or highways in the state."

Section 2:

"Section 2. Section 37 of Act No. 65 of the Acts of 1929 is hereby amended to read as follows:

"'It is intended by this statute to impose a tax upon the owners of all motor vehicles using a combustible type of engine, upon the public roads and highways, by requiring them to pay for the privilege there-

of, in addition to the usual license fee, the sum of six (6) cents per gallon for the motor vehicle fuel used, which tax is to be collected at the source in this state of the manufacturer or wholesaler, when sales of any motor vehicle fuel are made, and by him charged in his sales, the proceeds of which privilege tax are to be collected and used as may be provided by law, and on that not used as provided in this section refunds may be obtained by the consumer as provided in this Act.' "

It will be seen that paragraph (c) of Section 1 of Act 63 of 1931 expressly limited the imposition of the tax to gasoline actually sold in the state for use in the state. There was no authority in that section to demand the tax upon any gasoline brought into the state in the fuel tanks of motor vehicles. While that situation was existing, Act 67 of 1933 was enacted laying the tax upon all gasoline in excess of 20 gallons brought into the state in the fuel tanks of motor vehicles. So Act 67 of 1933 extended the tax to gasoline not touched by the 1931 laws. The 1933 act was an attempt by the legislature to reach gasoline that was escaping the tax altogether; it made the tax apply to a narrow, specific field where it had not previously applied. The successive acts of the legislature of Arkansas evidence a continuing purpose to increase the efficiency of gasoline tax collections by extending the tax to previously untaxed gasoline. *Sparling* v. *Refunding Board, supra,* (189 Ark. 189, 71 S. W. 2d 182).

That Act 67 of 1933 was intended by the legislature to be controlling as written in its specific field is plain from its express terms. It is entitled "An Act to Better Enforce the Gasoline Tax, and for other Purposes." It is apparent from the clear and unambiguous terms of Act 67 that it was the intention of the legislature to require

the tax upon all gasoline brought into the state in the fuel tanks of motor vehicles, twenty gallons being exempted. There is nothing in the act which limits the tax to gasoline actually used in the state; on the contrary the Act evidences the legislative intent to extend the gasoline tax beyond the limits of the general gasoline tax laws, as a means of better enforcing the collection of the tax.

The enactment of Act 11 of 1934 did not affect Act 67 of 1933. Section 2 of Act 11 of 1934 continued in effect paragraph (c) of Section 1 of Act 63 of 1931, without affecting Act 67 of 1933. Act 11 exhibits no intent to amend or repeal Act 67; rather, Act 11 was another step by the legislature in tightening up the enforcement of the gasoline tax by extending its coverage to gasoline previously untaxed, *Sparling* v. *Refunding Board, supra,* (189 Ark. 189, 71 S. W. 2d 182). With that intent present in Act 11, it cannot be said that the legislature intended to nullify Act 67 of 1933. This conclusion, plain in itself, becomes absolute upon a consideration of relevant judicial authority.

It will be observed that Act 11, and the statutes it amends and supplements, comprise the general laws for the imposition and collection of the gasoline tax. On the other hand, Act 67 is altogether specific in character. It applies only to one situation, the collection of the tax (fixed as to amount by Act 11) upon gasoline in excess of 20 gallons brought into the state in the fuel tanks of motor vehicles. So the case is governed by the principle expressed in *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209, 215:.

> "An earlier act, specific in its coverage, will be read as an exception to a later one directed to investments generally. 'It is a well settled principle of con-

struction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.' " (Citing cases.)

In that case the Act of Congress permitting state taxation of shares of stock in national banks was held to authorize taxation of shares owned by the Reconstruction Finance Corporation regardless of the later general Act exempting property of the Corporation from taxation by the states.

The same principle is held in many cases decided by the Supreme Court of Arkansas. *Chamberlain* v. *State*, 50 Ark. 132, 6 S. W. 524, involved the following: An act of Arkansas requiring a license for the sale of intoxicating liquors exempted from such requirement a manufacturer of wine selling only his own products. Thereafter an act, general in terms, was passed which imposed a tax upon each vendor of intoxicating liquors and required a license as a means of collecting the tax. The court held that the exemption in the prior act prevented a manufacturer of wine selling only his own products from being subject to the tax, saying:

> "A general affirmative statute does not repeal a prior particular statute, or particular provisions of a prior statute, unless negative words are used, or unless there be an invincible repugnancy between the two. *The more specific provision controls the general, without regard to their order and dates. The two acts are interpreted as operating together, the specific provisions furnishing exceptions and qualifications to the general rule.*" (Emphasis supplied.)

In *Lawyer* v. *Carpenter*, 80 Ark. 411, 97 S. W. 662, the Court said:

"A general law does not apply where there is another statute governing the particular subject, irrespective of the date of either the general or particular law. Neither repeals the other. The particular legislation covers the narrower field where it is applicable."

This principle is also held in *Washington* v. *Miller*, 235 U. S. 422, 428; *Kennedy* v. *United States*, 265 U. S. 344, 346; *Dunn* v. *Ouachita Valley Bank*, 71 Ark. 135, 71 S. W. 265; *Mills* v. *Sanderson*, 68 Ark. 130, 56 S. W. 779; *Ex Parte Morrison*, 69 Ark. 517, 64 S. W. 270; *State* v. *Kirk*, 53 Ark. 339, 13 S. W. 925; and *Thompson* v. *State*, 60 Ark. 59, 28 S. W. 794.

(2) While it is of course impossible to consider one law entirely apart from others, we now direct attention to the proposition that it is not necessary to consider all this legislative history and judicial authority in order to sustain Act 67 of 1933 as an independent act which levies a tax according to its plain and precise terms. Only for the purpose of fixing the *amount* of the tax is it necessary to refer to other laws. The legislative intent in enacting Act 67 is too plain to require construction. Until the legislature manifests a plain intention to amend or repeal it, it stands unchanged by the mutations in other laws. Regardless of how the tax may apply to other gasoline, Act 67 lays it on all gasoline in excess of twenty gallons in the fuel tank of a motor vehicle entering the state. Thus Act 67 of 1933 is an independent act complementary to the other motor fuel tax acts of the state. Compare *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472.

IV.

REPLY TO PART IV, PAGES 34-46 OF: APPELLEE'S BRIEF

In pages 34-37 appellee argues that the tax is not imposed as compensation for the privilege of using the highways. This subject was discussed in our first brief, pp. 15-18. We may here continue our discussion, just had in Part III hereof, of Act 67 of 1933 with reference to appellee's contention (p. 30) that in considering the nature of the tax "Act 67 of 1933 is of no assistance." Assuredly Act 67 can be taken into account in determining the character of the tax in issue here. Act 67 affects only highway users. It requires them to pay the tax of 6½ cents on all gasoline in excess of 20 gallons brought in in fuel tanks of motor vehicles. Payment of the tax is a prerequisite to the lawful use of the highways. Thus Act 67 comes squarely within the test of a tax for the privilege of highway use stated in *Morf* v. *Bingaman*, 298 U. S. 407, 410:

> "Unlike the general tax in *Interstate Transit Incorporated* v. *Lindsey*, 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee. The manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge for the privilege."

Regardless of the nature of the tax required by Act 11 of 1934, Act 67 of 1933, by itself plainly requires a tax for the privilege of using the highways. In this view Act 67 may be regarded as an act complementary to other motor fuel tax laws. Compare *Gregg Dyeing Co.* v. *Query*, *supra*, (286 U. S. 472).

Perhaps further emphasis should be given here to the point, plain in the *Sparling* case, that the gasoline tax in Arkansas always has been, and always has been held to be, a tax levied as compensation for the privilege of using the highways. The *Sparling* case cites as authority on that point *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753. There the Supreme Court of Arkansas, construing the state's first gasoline tax law (Act 606 of 1921), said:

> "The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured."

Act 11 of 1934 did not change the purpose or nature of the gasoline tax; as pointed out by the Supreme Court of Arkansas in the *Sparling* case, all Act 11 accomplished was to end the granting of refunds to users for non-highway purposes in order to eliminate the principal means of evading the tax. The tax still remains one exacted for the privilege of using the highways. If the Supreme Court of Arkansas erred in any respect in the *Sparling* case (and we submit that it did not), that error did not consist in the holding that the tax is required for the privilege of using the highways but in saying that a highway use tax can be imposed upon non-highway users in order to eliminate a source of wholesale evasion of the tax. And as to an error of that character a highway user cannot complain.

On page 37 appellee cites three cases to the effect that this Court "is not bound by any characterization of a tax on the part of the State Court." The rule appellee tries to invoke obviously has no application here, as is evident from appellee's own authorities as well as later cases, *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 381; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 609; *Morehead* v. *New York*, 298 U. S. 587, 609; cases cited p. 17 our first brief.

Pages 38-43 of appellee's argument have been fully answered in our first brief or in this reply brief.

We submit that appellee's comments on *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626 (p. 44) are substantially a confession of judgment. The tax in the Bingaman case was an excise upon the sale of gasoline; the tax in the instant case is one for the privilege of using the highways. This Court stated in the Bingaman case that a tax of the latter description would be valid, and further held that it was bound by the characterization of the tax in the Bingaman case by the Supreme Court of New Mexico. As appellee concludes its argument in this case by stating that the principles of the Bingaman case are conceded by it, it is difficult to perceive just what argument appellee has left to sustain its position.

Respectfully submitted,

FRANK PACE, JR.,
Attorney for State Revenue Department,
State Capitol,
Little Rock, Arkansas.

AMOS M. MATHEWS,
204 South Canal Street,
Chicago, Illinois.
Counsel for Appellant.